IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 11

ALMA MOTOR COMPANY, *Petitioner*;

v.

THE TIMKEN-DETROIT AXLE COMPANY, *Respondent*,
UNITED STATES OF AMERICA, *Intervenor*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENT'S OPPOSITION TO THE MOTION BY THE UNITED STATES TO VACATE THE JUDGMENT BELOW AND TO REMAND THE CAUSE FOR FURTHER PROCEEDINGS.

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STRAUCH & HOFFMAN,
Of Counsel for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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I. A Decision as to Whether the T-79 Transfer Cases are within the Ruggles Patent and the Coextensive Agreement is Not Necessary to Properly Present the Constitutionality of Public Law 768.

The United States in its motion to vacate the judgment below and to remand this cause for further proceedings to

determine whether the appealed subject matter, the T-79 transfer cases, is within the agreement and, therefore, subject to Public Law 768 overlooks the scope of respondent's motion in the Court of Appeals and of the Court of Appeals decision. The following brief history of this proceeding is accordingly believed necessary to fully understand the situation in this cause.

This action is a declaratory judgment action filed by respondent long prior to the passage of Public Law 768. It sought a declaration as to respondent's royalty liability under its license agreement with petitioner. Petitioner contended the T-32, T-43, T-79 and other transfer cases were subject to royalties. Respondent contended that none of its transfer cases, except possibly the T-43, were subject to royalty. Plaintiff's contention, except for the T-32 and T-43 transfer cases and immaterial variations thereof was sustained by the District Court's Declaratory Judgment filed on December 2, 1942 (R. 49). It will be noted that this Judgment was entered a little over one month after Public Law 768 was approved and became law (R. 56-59).

On or about December 30, 1942, written notice was given respondent and petitioner by the War Department under Public Law 768 (R 93) that the rates of royalties being paid by respondent were unreasonable and that no further royalties should be paid pending issuance of an order under this Public Law. Conceiving that the District Court's Judgment was merely declaratory and contained provision for future enforcement (R. 50, 51), that the War Department Order was executory and must be obeyed, that no violation of the District Court Judgment would result from compliance with the War Department Order, that Public Law 768 rendered any executory relief in this action impossible, and that an appeal or effort to enforce the District Court's Declaratory Judgment was useless because it involved moot questions or questions within the jurisdiction of the Court of Claims, respondent did not appeal but

awaited the final order from the War Department before determining what action should be taken in this cause.

Petitioner, instead of complying with the District Court Judgment and seeking to enforce the provision for payment of royalty on the T-32 and T-43 transfer cases on February 27, 1943 (R. 51) appealed from that part of the Judgment relating to the T-79 transfer cases. Respondent on August 25, 1943, filed its motion to dismiss the appeal and to remand the cause to the District Court with instructions to vacate its judgment and enter a judgment dismissing the complaint and counterclaim because of transfer of jurisdiction of the subject matter to the Court of Claims or, in the alternative, to dismiss the appeal and remand the cause to the District Court with instructions to reconsider its judgment in light of the War Department order and take such further action as may be appropriate (R. 53). This was followed by intervention of the United States on November 15, 1943 (R. 98) and, on December 6, 1943, by petitioner's Petition to Review and Vacate Royalty Adjustment Order No. W-3 of the War Department.

In support of its motion respondent filed the affidavit of John E. Gallagher (R. 60, 61) showing that no present controversy existed except as to devices made for the Government.

The Court of Appeals, after briefing and argument of the case on its merits as well as respondent's motion and petitioner's petition, entered its order denying petitioner's petition (R. 111), its opinion (R. 112, 129), and its order vacating paragraph 5 of the District Court Judgment (R. 121). This latter order, it is submitted, by vacating paragraph 5 of the judgment, held there was no justiciable controversy arising out of the facts set forth in the complaint concerning the T-79 transfer cases and devices other than the T-32 and T-43 transfer cases, and specifically instructed the District Court that it might, "if it deems such action to be appropriate, vacate all or any part of the remainder of the judgment and dismiss the complaint as moot." (R. 121).

This latter provision and the denial of petitioner's petition, it is submitted, is a direct ruling that Public Law 768, which the Court of Appeals held constitutional, was applicable, at least in connection with the portion of the judgment holding the T-32 and T-43 transfer cases within the scope of the judgment and that royalties should be paid under the agreement.

It follows, therefore, even if the Appeal Court's action in vacating paragraph 5 of the District Court judgment and denying petitioner's petition to Review and Vacate Royalty Adjustment Order No. W-3 does not constitute a ruling, such as that sought under the Government's present motion, that the Court's action in remanding the cause to the District Court to take further action on the remainder of the judgment and dismiss the counterclaim, if such action was deemed appropriate under the constitutional Public Law 768, makes a present decision on the Constitutional question necessary in order to dispose of these latter issues which both lower courts held were proper issues under the agreement and complaint.

Denial of the present motion and decision of the Constitutional question now before this Court is, accordingly, respectfully solicited.

II. Dismissal of the Appeal and Remanding of the Cause to the District Court is Proper in Any Event.

Assuming arguendo that the T-79 transfer cases are not within the scope of the agreement and, therefore, application of Public Law 768 is not warranted in connection with these particular transfer cases, the Court of Appeals action in vacating paragraph 5 of the judgment is nevertheless proper.

It is submitted that Timken's production of the T-79 cases for the Government's use is either licensed production under its agreement and subject to Public Law 768, or unlicensed production subject to the Act of June 25, 1910, as amended by the Act of July 1, 1918, 36 Stat. 851,

40 Stat. 705; 35 U. S. C. 68. In either case, Alma's right to compensation is determinable by action against the Government in the Court of Claims and no justiciable controversy exists between petitioner and respondent. It follows, therefore, that a decision on the status of the T-79 cases is wholly immaterial in this action where the record shows the only actionable production is for Government use.

It is submitted, therefore, that the Court of Appeals action in dismissing the appeal and vacating paragraph 5 of the District Court Judgment on the basis of the lack of a justiciable controversy is correct for this further reason and that petitioner and respondent should not be required to prosecute this cause further to secure a decision on this question, even if it be held that the constitutional question is not presently ripe for decision by this Court.

Respectfully submitted,

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J. MATTHEWS NEALE,
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